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January 27, 1993

STEPHEN R. ROSS

HAND-DELIVERED

Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Rate Regulation
MM Docket No. 92-266

Dear Ms. Searcy:

Enclosed on behalf of Armstrong Utilities, Inc., are the original and nine copies of Armstrong's Comments in the above-referenced proceeding.

Please address any questions concerning this letter to the undersigned.

Cordially,

Stephen R. Ross

SRR/sdb
Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

COMMENTS OF ARMSTRONG UTILITIES, INC.

Stephen R. Ross
Kathryn A. Hutton

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Counsel for Armstrong Utilities, Inc.

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SUMMARY

Armstrong Utilities, Inc. submits the following comments regarding the implementation of the rate regulation provisions of the 1992 Cable Act ("the Act"). Armstrong generally supports the Commission's view that a benchmark method of rate regulation should be applied to basic service tier. As discussed herein, benchmark rates, which would be presumptively lawful, should be administratively efficient to apply and provide franchise authorities with sufficient federal guidance to implement basic tier rate regulation in a uniform manner across the United States. While benchmark rates would necessarily reflect an averaged calculation of existing rates based on the information collected in the Commission's survey, Armstrong urges the Commission to adopt a benchmark methodology that is flexible and considers specific system characteristics, such as the location of the system, number of activated channels, and other factors discussed herein, which directly affect costs. If a benchmark rate applied to a particular system would not be fair and compensatory, then operators may use, among other methods, a traditional cost-of-service showing to justify above-benchmark rates.

In developing benchmark basic tier rates and standards for cable programming services, Armstrong emphasizes that the Commission must consider the impact on the entire package of programming services offered by cable systems. Operators must have the flexibility to market their services and develop new services to meet customer demand and remain competitive. Armstrong believes

in some instances this means that the subscribers, franchising authorities and operators will agree to include a number of additional services on the basic service tier.

Armstrong believes that the Commission should adopt a dual certification for franchise authorities. Local review of rates within a benchmark set by the Commission would be certified at the initial level. However, certification at the second level would require the Commission to find that a particular franchise authority is competent (and/or willing) to review the much more complicated cost-of-service showing. Armstrong also suggests that the Commission take an active role in the review of franchise authority actions pursuant to regulations established in this proceeding. The Act confers broad preemptive powers on the Commission, and as discussed below, there is no role for state courts in the review of franchise authorities' rate determinations or findings of effective competition.

As with basic tier rates, rates for cable programming services must take into account any unique system characteristics which affect the cost of service, and must recognize that the majority of cable programming costs are directly attributable to the cost established by contract for the programming. Further, since Commission review of cable programming service rates will be initiated by franchise authority or subscriber complaints, standards developed by the Commission for a minimum showing of unreasonableness must be fair, allege sufficient standing, provide notice to the operator of the issues alleged in the compliant, and be filed in a timely manner.

Armstrong submits that the Commission cannot establish broad policies on acts which may constitute evasion of the Act. Evasion must be considered on a case-by-case basis which considers specific fact and circumstances, and most importantly, the operator's intent. Similarly, with respect to establishing maximum rates for leased access channels, the Commission must consider on a case-by-case basis specific rates proposed on a particular system. There is presently not enough leased access rate information for the Commission to set maximum rates. Armstrong submits that the Commission would become involved only in the event the lessee and operator cannot agree on reasonable terms for the lease of access channels.

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	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

COMMENTS OF ARMSTRONG UTILITIES, INC.

I. INTRODUCTION

Armstrong Utilities, Inc. ("Armstrong"), by its attorneys, hereby submits the following comments in response to the Federal Communications Commission's ("FCC or "Commission") Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

Armstrong owns and operates cable television systems throughout the United States. Accordingly, Armstrong is subject to the rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act"), as well as any regulations promulgated by the FCC to implement these statutory provisions.

In general, Armstrong supports the Commission's tentative conclusion to establish a benchmark method of rate regulation governing rates for the basic tier and for equipment used with the basic tier. Primarily for the reasons identified by the FCC in its NPRM, Armstrong agrees with the Commission that traditional cost-of-service rate regulation (also referred to as the rate-of-return model of regulation) should not be used for determining whether a cable operator's rates are reasonable, but rather only as one means to justify rates above the benchmark.

Armstrong cautions the Commission that rate regulation of the cable industry must be implemented in a manner which recognizes that cable operators need flexibility to market existing services and create new programming services. Congress has acknowledged that the cable industry is a valuable source of diverse programming and that it has substantially increased the average number of basic and total channels and developed and installed beneficial new technology (including fiber optic plant). The FCC is facing a difficult balancing task when it endeavors to establish "reasonable" rates while ensuring that the cable industry remains viable and competitive. The Commission must recognize that setting rates for the basic service tier will impact rates established for a system's other programming tiers and premium services. It is crucial that the Commission's rate regulations consider the entire package of programming services offered by cable systems, and balance rate requirements over all programming tiers and pay services.

II. EFFECTIVE COMPETITION

The starting point for any analysis of rates is whether the cable system is subject to "effective competition." Cable systems faced with effective competition are not subject to rate regulation. The Act sets forth a three-part test for determining whether effective competition exists.[1] On this issue the Commission asks, essentially, what multi-channel video programming services are "comparable" to cable television service, and how should subscribership (or penetration) be calculated. See NPRM at ¶¶ 8 and 9.

A. Comparable Multi-Channel Video Programming Services

The definition of "multichannel video programming distributors" set forth in the Act specifically includes, but is not limited to: multipoint multichannel distribution service ("MMDS"); master antenna television service ("MATV"); satellite master antenna television service ("SMATV"); and direct broadcast satellite service ("DBS"). Congress specifically identified these entities as direct competitors to cable television systems.[2] Moreover, as the FCC correctly notes, Congress' definition was not intended to be all inclusive. "Video dialtone" service providers and leased access users may also be considered among the competitors to cable systems. NPRM at ¶ 9.

The key, however, to determining whether effective competition exists between a cable system and competitors is

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[1] Effective competition exists where: (1) the cable system has less than a 30% penetration in the franchise area; (2) 50% of the households in the franchise areas have access to at least two multichannel video program distributors which offer comparable video programming, and at least 15% of those households actually subscribe to one of them; or (3) the franchise authority operates a competing system and has access to 50% of the households in the franchise area. 47 U.S.C. § 543(l)(1)(B), (C).

[2] Existing Television Receive-Only ("TVROs") satellite dishes also should be considered in any calculation of multichannel video competitors.

whether such competitors offer "comparable video programming." Armstrong agrees with FCC's assertion that "comparable" service should be presumed to exist if a competitor "offers" multiple channels of programming and the requisite subscriber counts are met. NPRM ¶ 9. It is unnecessary to establish a threshold minimum number of channels offered by a competitor for purposes of determining whether effective competition exists because the simultaneous delivery of multiple channels is not what is meaningful.

For example, cable television subscribers technically have simultaneous access to multiple channels, although cable subscribers can only watch one channel at a time. In contrast, a video dialtone service may only provide one video channel to the subscriber's television, but the subscriber can nonetheless select from numerous programs offered by the service provider for viewing on that channel. Thus, a video dialtone service which may technically consist of one channel yet which offers the subscriber a choice of programming, is clearly "comparable" to cable service.

Moreover, the requisite availability and subscribership levels of a competitor's video programming service set forth in the statute is prima facie evidence of effective competition. This approach is consistent with past Commission practice. In its 1991 proceeding to reexamine the effective competition standard, the Commission noted that availability of and subscribership levels "to an alternative service are reasonable benchmarks for determining when a cable system faces effective competition from multichannel service providers."[3]

B. Measuring Subscriber Penetration

To implement the second statutory test for determining whether effective competition exists, the FCC has tentatively proposed to measure cumulative subscriber penetration by considering all alternative video program providers (except the largest) in the franchise area together. NPRM ¶ 9. Armstrong supports the Commission's proposal. In determining the penetration of competing MATV, SMATV, TVROs (which would include DBS as well as C and Ku-band dishes), or MMDS services, the subscriber count should be measured by counting all individual residential or habitable units. In general, all apartments and college dormitory and military barracks units should be counted separately. However, commercial contracts between multichannel video program providers and hotels or hospitals which offer video programming to non-residents and travelers should only count as one unit.

C. Availability of Subscriber Information for Purposes of Determining Effective Competition

The Act states that the relevant geographic area for purposes of conducting an effective competition analysis is the cable system's franchise area. However, alternative video program providers' market area and coverage patterns may vary

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[3] Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, 6 FCC Rcd. 4545, 4553 (1991).

significantly -- e.g., MMDS operators have an exclusive area of protection, DBS service covers the entire continental U.S. and SMATV and MATV activities typically provide service to individual buildings. Accordingly, the subscriber penetration of alternative video service providers within a cable system's franchise area may not be readily apparent. Therefore, MMDS, DBS, SMATV operators, and local TVRO dealers must be required to provide the FCC with information on: (1) residences or habitable units in the cable system's franchise area; and (2) subscriber counts within the cable system's franchise area. This information should be provided on an annual basis. If necessary, cable operators should provide the FCC with zip code information for the franchise area to assist the alternative service providers in developing accurate information.

III. REQUIRED COMPONENTS OF BASIC SERVICE TIER

As a general matter, the FCC should recognize that the Act encourages cable operators to offer virtually all of their programming on an a la carte basis. The tier buy-through prohibition of the Act demonstrates this intent to encourage operators to offer programming on a per channel or per program basis. Congress recognized, however, that many cable systems are presently not technically capable of complying with the anti-buy-through provision, and excepted such systems from immediate compliance. Congress' expectation was that as technology developed, consumers should not be required to purchase additional programming or tiers of service to which they did not wish to subscribe.

The Act's definition of the basic tier as the tier "to which subscription is required for access to any other tier of service" is simply a recognition of the present state of technology. As technology develops, cable operators will be able to offer every program a la carte, including must-carry and retransmission consent signals. However, the Act does not mandate a basic service tier at all. Thus, Armstrong believes that the Act does not establish a "basic buy through" requirement. See, NPRM at ¶ 12. To the extent that a basic service tier is required to access other programming on a particular cable system, Armstrong agrees with the Commission's tentative conclusion that retransmission consent stations are required to be placed on the basic tier. NPRM ¶ 11.

In addition, the FCC must recognize that cable operators are allowed -- indeed, encouraged -- to create a basic tier which includes only those signals required by the statute, provided that the service is priced correctly. Therefore, retiering for the purpose of providing a "statutory" minimum basic tier cannot be perceived as evasion of the Act.

Nevertheless, a cable operator that chooses to offer additional services on the basic tier should be permitted to do so. While such a comprehensive basic service tier is subject to rate regulation in certain situations, subscribers, the franchise authority and the cable operator may agree that this is the appropriate service offering for their communities. The franchising authority has greater responsibility in this area and the Commission should refer to its judgment on this question.

IV. REGULATION OF THE BASIC SERVICE TIER BY FRANCHISE AUTHORITIES

A. Jurisdiction

The FCC has tentatively concluded that its jurisdiction to regulate the basic service tier may only be exercised if the FCC revokes or disallows a franchise authority's certification. NPRM at ¶15. Thus, unless the franchise authority first asserts jurisdiction, the FCC may not regulate basic service rates. Armstrong agrees with the Commission's interpretation of this section.

If a franchise authority cannot assert jurisdiction, and requests the FCC to regulate basic rates, then the FCC would be within the scope of the Act to assert jurisdiction over basic service rates. Otherwise, basic rates would not be subject to regulation by the Commission. NPRM at ¶ 16.

B. Finding of Effective Competition

While the Act requires the FCC to "find" whether a cable system is subject to effective competition, the FCC proposes to base its determination on the franchise authority's initial assessment. NPRM at ¶ 17. Given the substantial number of franchises throughout the United States and their diverse characteristics, requiring the franchise authority to initially gather and assess information provided by local multichannel video program distributors is reasonable. As noted above, however, in order to conduct a sufficient review of competition in the franchise area, cable system competitors must be required to disclose the number of subscribers in the cable system's franchise area, and any other relevant data to the franchise authority and the FCC. Armstrong notes that, in response to the Commission's concern over access by operators of proprietary information disclosed by competitors, the Commission's current rules governing the withholding of records from public inspection affords adequate protection of such information. See 47 C.F.R. § 0.457 - 0.459.

The disclosure of subscriber count information is necessary not only for the appropriate assessment of effective competition by the franchise authority and the FCC, but also for cable operators to exercise their right to challenge any finding made by the franchise authority and/or the FCC. To effectively challenge such a finding, the cable operator should be served with a copy of the franchise authority's determination. The determination must be provided in writing indicating the franchise authority's specific findings supporting its decision and the factual basis therefor. Moreover, the franchise authority should be required to issue a determination within a reasonable time period (Armstrong suggests 60 days) of the cable operator's challenge.

In addition, if effective competition later develops in an area, the cable operator should be permitted to petition the franchise authority for a change in regulatory status. Thus, the cable operator as well as the franchise authority must be able to request subscriber information from alternative video program distributors periodically to determine the state of competition. The franchise authority should be required to respond within a reasonable time period. (Again, Armstrong suggests 60 days). A copy of the petition should be served on the FCC. Operators that are denied a change in status by the franchise authority should be permitted to petition the FCC for review.

Armstrong agrees with the Commission's position that where a franchise authority has not sought certification, the Commission should make effective competition determinations as necessary only in response to complaints concerning cable programming service. NPRM at ¶ 17, n.37. The FCC should clarify that if a franchise authority does not make any finding of effective competition, then that franchise area should be presumed to have effective competition.

C. Franchise Authority Certification Process

To certify franchise authorities wishing to regulate basic service rates, the FCC proposes to utilize a standardized form that would solicit the requisite information required by the Act.[4] In general, Armstrong agrees with this approach. However, assuming that the FCC adopts a benchmark method of rate regulation,

[4] NPRM at ¶ 20. Section 3(a)(3) of the Act requires the franchise authority to certify that: (1) it will adopt and administer regulations consistent with regulations prescribed by the Commission; (2) it has legal authority to do so; and (3) its procedures applicable to rate regulation will provide an opportunity for consideration of the views of interested parties.

Armstrong proposes that franchise authorities be subject to the dual certification process described below.

If the FCC adopts a benchmark method of rate regulation, existing and proposed rates will either be within the benchmark range, and therefore presumptively lawful, or above the benchmark, and some justification would be required. At the initial certification level, all franchise authorities should be required to make a threshold showing, in addition to the requirements for certification set forth in Section 3(a)(3) of the Act, that they are qualified and have the personnel to review a presumptively lawful rate using the Commission's benchmark rate formula.

Operators whose rates are above the benchmark may be required to justify the higher rates in a more or less traditional cost of service (or rate of return) proceeding. Therefore, the second certification would require that the franchise authority certify that it is qualified to review a cost of service showing. Such a certification must allege that the franchise authority has the staff and/or contract resources to analyze a cost of service showing. If the franchise is unable or unwilling to make the second certification, then the FCC would conduct the rate review.

Armstrong believes some sort of dual certification process is necessary where the franchise authority may be called upon to conduct an extensive cost of service review of an operator's rates. As the Commission well knows, such reviews are complicated and require a high level of expertise. It should not be presumed that all franchise authorities are qualified to review cost of service showings (or are interested in doing so). If the cable operator is required to justify a rate through a cost of service showing, then the operator should at least have the right to have it reviewed initially in a competent manner.[5]

D. Approval and Revocation of Certification

The Act provides that a certification submitted by a franchising authority to the Commission becomes effective after 30 days, unless the Commission denies the certification. As soon as the rules in this proceeding become effective, thousands of franchise authorities across the United States asserting regulatory jurisdiction will make their "no effective competition" determinations, submit their qualifications and request certification from the Commission. Given the massive number of certifications that the Commission will be required to process, it is highly unlikely that the Commission will actively consider each certification request within 30 days. As a result, Armstrong recognizes that many certifications will go into effect after 30 days without Commission review. Commission consideration of operator challenges to a franchise authority's certification before it goes into effect may not be feasible. Therefore, Armstrong suggests that an operator should be able to challenge the franchise authority's finding that no effective competition exists. A challenge should be filed within 90 days of the effective date of

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[5] The Commission must make clear that: (1) the franchise authority's cost of administrating rates is a component of franchise fees and cannot be assessed against the cable operator; and (2) the cable operator's cost of rate regulation is an appropriate cost of service expense.

the final order adopted in this proceeding. The franchise authority's power to regulate rates should be stayed until the Commission has had an opportunity to review the pleadings submitted by all parties if a finding of effective competition is challenged.

In contrast, where the operator seeks to challenge a franchise authority's qualifications to administer rate regulations, it seems realistic to consider such challenges within the context of a revocation proceeding. Presumably, the certification would remain effective pending Commission review. In both cases, the operator should serve the franchise authority with a copy of the challenge. The franchise authority should have 30 days to respond, and the operator should have another 20 days to reply.

E. Scope of Federal Preemption

The Act clearly provides that the Commission may not approve or must revoke a franchise authority's certification if state or local laws or regulations conflict with the rate regulations established by the Commission in this proceeding.[6] If the Commission does revoke a certification, the Act directs the FCC to assert jurisdiction to regulate basic service rates until

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[6] Section 3(a)(4) of the Act states that a certification by the Commission may not be approved if the franchising authority "has adopted or is administering regulations . . . that are not consistent with the regulations prescribed by the Commission." Similarly, Section 3(a)(5) of the Act states that the Commission must revoke the certification of the franchise authority if it finds that "State and local laws and regulations are not in conformance with the regulations prescribed by the Commission."

the franchise authority becomes qualified.[7] In analyzing the scope of its preemptive powers, the Commission asks whether the Act only preempts facially inconsistent state rate regulations or other actions, such as the lack of adequate personnel, which would require it to revoke a certification. NPRM at ¶ 26.

The clear and express preemptory language of the statute, cited above, confers broad preemptive powers upon the Commission. This preemptory language applies to not only the adoption of inconsistent laws or regulations by a franchising authority, but also to any action (or inaction) or interpretation of a facially consistent law, taken by a franchise authority that does not promote the intent and purpose of any regulations adopted by the Commission. It is clear from the plain language of the statute that the Commission is required to assume the regulatory powers of the franchise authority, if the Commission disapproves or revokes the franchise authority's certification.

Further, any appeal of a franchise authority's determination of the reasonableness of an operator's basic rates would be reviewable only in federal court or before the Commission.[8] As Armstrong has indicated in comments filed in

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[7] Section 3(a)(6) of the Act states that the "Commission shall exercise the franchising authority's regulatory jurisdiction . . . until the franchising authority has qualified to exercise that jurisdiction."

[8] The Commission asks whether operators should appeal a franchise authority's rate order in state court. NPRM at ¶ 87.

another rulemaking initiated pursuant to the Act,[9] state court review of a franchise authority's action applying the Commission's rate methodology is preempted. Where Congress has occupied a field, as it has done here, a state law cause of action to enforce legal or equitable rights that are equivalent to rights afforded under the federal law is preempted.[10]

In addition, the rate provisions of the Act are inextricably intertwined with the must-carry and retransmission consent provisions, and the application and enforcement of must-carry is exclusively within the FCC's jurisdiction.[11] The cost of delivering the basic tier broadcast signals and the cost of retransmission consent fees must be included in any "reasonable" rate base. The Act specifically directs the FCC to consider the impact retransmission consent will have on cable television rates. Any judicial review of rates must consider the impact on the carriage of must-carry stations and retransmission consent stations. Therefore, the FCC is the most appropriate forum in

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[9] Broadcast Signal Carriage Issues, MM Docket No. 92-259, Comments of Armstrong filed January 4, 1993, pp. 35-38.

[10] Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F.Supp. 838, 849 (D.Mass. 1986) (cable operator's state law claim of conversion was preempted by the Copyright Act). See also, Harrison Higgins, Inc. v. AT&T Communications, 697 F.Supp. 220 (E.D.Va. 1988). Moreover, where the federal government has occupied the field and the federal regulations fail to deal with a particular question, "the courts are to apply a uniform rule of federal common law." Harrison Higgins, supra, 697 F.2d at 224.

[11] The Act expressly preempts all state and local regulation of mandatory carriage and vests the FCC with exclusive jurisdiction to resolve must-carry disputes.

which to review franchise authorities' determinations on the reasonableness of basic tier rates.

F. Procedures for the Commission to Assume Jurisdiction Over the Regulation of Basic Service Tier Rates

If the FCC were required to assume jurisdiction over the regulation of basic tier rates, the operator should submit a schedule of its effective rates to the Commission with a statement indicating whether the rates are within the benchmark. If an operator's rates are within the benchmark, then the Commission would not be required to take further action. If an operator's effective rates are above the benchmark rates established in this proceeding, then the operator should submit to the Commission a description and justification explaining why its rates are not within the benchmark. If the Commission does not respond or otherwise disallow the rate, then the rate would become effective in 60 days.[12]

V. RATE REGULATION OF BASIC SERVICE TIER

A. General Criteria

As indicated above, Armstrong strongly agrees with the Commission's preliminary finding that traditional cost-of-service or "rate of return" regulation should not be adopted as the primary method of rate regulation for the basic tier. The disadvantages of rate of return regulation have been well documented by the Commission, and Armstrong supports the Commission's view that the

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[12] Rates in effect at the time regulation commences should remain in effect until disallowed.

disadvantages outweigh any perceived benefits of this regulatory model. Similarly, the price cap regulatory model, which essentially uses costs defined by rate of return methodology to define appropriate caps on rates, cannot be readily or easily applied to the cable industry without uniform accounting methods in place.

Armstrong recognizes that in situations where a cable operator will be required to justify a rate, there may be few workable alternatives to some type of cost of service showing. Therefore, Armstrong supports the Commission's view that a "benchmark" approach should be used to establish presumptively "reasonable" rates. Rates above the benchmark could be justified and deemed reasonable upon an appropriate showing by the cable operator, using, among other things, cost-of-service (or rate of return) regulation.

B. Armstrong's Comments on a Benchmark Methodology

The Commission sets forth several alternatives which could be utilized to implement a benchmark methodology. While Armstrong agrees with and supports the Commission's desire not to become mired in an extensive review of costs, at some level an analysis of costs cannot be avoided. Moreover, the Act sets forth criteria which the FCC is required to consider in developing a methodology for regulating basic tier rates, and several of these criteria include costs, such as the cost of obtaining and transmitting signals, payments made under the Compulsory License, franchise fees and other taxes. See, Section 3(b)(C) of the Act.[13] It is crucial that the FCC clarify that retransmission consent costs are included in the "direct costs of obtaining, transmitting, and otherwise providing signals carried on the basic tier." Section 3(b)(C)(ii) of the Act. In keeping with the Congressional directive to keep basic tier costs "reasonable," the FCC must place some parameters on retransmission consent fees.[14]

Armstrong believes that it is important for the Commission to adopt benchmarks which are flexible and account for as many cost factors as is reasonable, fair and compensatory, and relatively easy to use, and which provide sufficient guidance to franchise authorities to implement and review basic service tier rates. Several key factors significantly affect the cost of providing basic service, and these factors must be considered by the Commission and franchise authorities in developing and applying benchmark rates. It is important for the Commission to keep in mind that these basic rates must be able to stand on their own as fair and compensatory.

One of the most important factors is the cost of capital. Capital investment defines the technical sophistication of a

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[13] Armstrong agrees with the FCC's tentative view that it should give equal weight to all seven factors. NPRM at ¶ 31.

[14] As a general observation, Armstrong submits that the First Amendment prohibits the Commission from adopting a cost-per-channel method of rate regulation if such a method assigns different channel values based on program content. Any cost-per-channel method considered by the Commission must be carefully tailored to comply with the First Amendment.